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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTESA SANPAOLO, S.P.A., Plaintiff, - against - CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK, CRÉDIT AGRICOLE SECURITIES (U.S.A.) INC., THE PUTNAM ADVISORY COMPANY, LLC, MAGNETAR CAPITAL LLC, MAGNETAR FINANCIAL LLC, and MAGNETAR CAPITAL FUND, LP, Defendants.	Case No. 12-cv-2683 (RWS) ECF Case

MEMORANDUM OF LAW IN SUPPORT OF MAGNETAR CAPITAL LLC, MAGNETAR FINANCIAL LLC, AND MAGNETAR CAPITAL FUND, LP's MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) AND 9(b)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Defendants Magnetar Capital LLC, Magnetar Financial LLC, and Magnetar Capital Fund, LP (together, the "Magnetar defendants") respectfully submit this memorandum of law in support of their motion, pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, to dismiss the First Amended Complaint ("Amended Complaint"), which was filed by Plaintiff Intesa Sanpaolo, S.p.A. ("Intesa") on June 22, 2012 in response to the motions to dismiss the original complaint filed by the Defendants.

PRELIMINARY STATEMENT

This case is about a bilateral derivatives trade between two sophisticated counter-parties: Plaintiff Intesa, Italy's largest investment bank, and Defendant Calyon CIB. That trade took the form of a credit default swap ("CDS"), a financial swap agreement wherein the seller of the CDS (Intesa) agrees to compensate the buyer (Calyon) in the event of a loan default or other credit event in exchange for a series of payments made by the buyer (the "Intesa Swap"). The Intesa Swap referenced certain notes owned by Calyon that had been issued by Pyxis ABS CDO 2006-1 ("Pyxis" or the "Pyxis CDO"), a synthetic collateralized debt obligation ("CDO") designed to provide exposure to subprime mortgages, and was entered into, as Intesa itself acknowledges, well after subprime mortgage delinquencies began to rise.[1] Now, more than five years after the effective date of its CDS, Intesa comes forward to allege that it was fraudulently induced to enter into the Intesa Swap by virtue of alleged misrepresentations and omissions supposedly made by either or both of Defendants Calyon and Putnam regarding the selection process for, and value of, the assets owned by Pyxis.

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[1] For a general description of CDOs, as well as background information regarding the Pyxis CDO specifically, see *Loreley Fin. (Jersey) No. 7 v. Crédit Agricole Corporate & Inv. Bank*, Index No. 10-650673, slip. op. at 2-4 (N.Y. Sup. Ct. June 9, 2011), a recent New York Supreme Court case that involved nearly identical claims regarding the Pyxis CDO. Unlike Intesa, the plaintiff in that case actually held a note issued by the Pyxis CDO rather than a third-party derivative contract on notes issued by the Pyxis CDO; yet that plaintiff, which along with its related entities has commenced no fewer than nine lawsuits against at least sixty-four defendants relating to its CDO investments, did not name any Magnetar defendant in that action or any other action. Nonetheless, that plaintiff's claims against Putnam, which mirror those at issue here, were summarily dismissed by Justice Schweitzer. *Id.*

Yet Intesa brings this action not only against Calyon (its contractual counterparty to the CDS) and Putnam (Pyxis's collateral manager)—as the parties who supposedly made the alleged misrepresentations and omissions—but also against the Magnetar defendants, who are alleged to have aided and abetted the alleged fraud, and participated in an alleged conspiracy to defraud, ***not*** because they had anything to do with the alleged misrepresentations that purportedly induced Intesa to enter into the Intesa Swap, but because they allegedly (a) had both long and short positions relating to the Pyxis CDO, and (b) "hijacked" the collateral selection process from Putnam so that the Pyxis CDO could be designed to fail. Paradoxically, Intesa makes these allegations despite the fact that Intesa also held both long and short positions relating to the Pyxis CDO through multiple CDS investments—the very same investment strategy for which it castigates the Magnetar defendants. (*See* Declaration of Lea Haber Kuck dated July 20, 2012 ("Kuck Decl.") [Docket No. 39], Ex. D, 9/7/2006 Email.) Not only that, Intesa also attempts to assert legal claims against the Magnetar defendants despite the fact that Intesa expressly acknowledges in the documentation of the Intesa Swap that Intesa has no rights against third parties, like the Magnetar defendants, related to the circumstances of that contract. Even more fundamentally, Intesa seeks to hold the Magnetar defendants responsible for its ordinary investment losses notwithstanding that Intesa does not allege that any Magnetar defendant:

(i) even knew about the Intesa Swap, let alone ever met with, spoke to, communicated with, traded with, negotiated with, or contracted with Intesa;

(ii) was ever present when the other Defendants met with, spoke to, communicated with, traded with, negotiated with, or contracted with Intesa;

(iii) ever made, assisted in, or participated in the preparation or dissemination of any statement, oral or written, to Intesa about the CDS, the collateral selection process, or collateral valuations (or anything else for that matter) for the Pyxis CDO; or

(iv) ever, directly or indirectly, usurped Putnam's independent judgment with respect to any specific collateral owned by the Pyxis CDO.

Instead, Intesa makes sweeping and wholly conclusory allegations largely based on unsubstantiated, anecdotal stories from newspapers and other media sources—which themselves rely on anonymous sources and proffer theories that have never been subject to the scrutiny of a trier of fact—reporting on other alleged transactions or the alleged misconduct of other parties.[2] In its Amended Complaint, which Intesa filed *sua sponte* after receiving the Defendants' motions to dismiss the original complaint, Intesa attempts to create the appearance that there is some evidentiary support for its sweeping theories by selectively quoting and mischaracterizing a handful of emails—many of which do not even relate to Pyxis—that it claims recently became public, but which in reality were produced in other litigation without confidentiality restrictions long ago. Most fundamentally, these emails do not come close to remedying the core defect in Intesa's original complaint with respect to the Magnetar defendants—namely, that Intesa fails to allege that the Magnetar defendants had any role whatsoever in the alleged misrepresentations and omissions underpinning Intesa's claims. And what's more, these emails actually contradict the notion that the Defendants engaged in some coordinated scheme to defraud anyone. As explained below, the central inference that Intesa draws from these emails—that the Magnetar defendants controlled the collateral-selection process for Pyxis in order to cause its failure—is unfounded, speculative, and ultimately implausible. Nothing in these emails reflects actions that are inconsistent with the interests of long investors. On the contrary, the only plausible reading of these emails is that the Magnetar defendants sought some awareness of Putnam's collateral selection process given that Magnetar's alleged $61.75+ million "long" investment in the CDO depended upon the performance of that collateral; this is especially so given that Intesa has failed

[2] The Amended Complaint also seeks to capitalize on the few regulatory actions taken against investment banks related to their allegedly inadequate disclosures in the marketing of CDOs (unrelated to Pyxis). While the Amended Complaint purports to cite matters in which "Magnetar" allegedly was involved in the collateral selection process for the CDO (Am. Compl. ¶ 3), in none of these matters has any Magnetar entity been accused of (much less found liable for) fraud, aiding and abetting fraud, conspiracy to defraud, or any wrongdoing whatsoever.

to identify a single asset that did not meet the Offering Memorandum's detailed criteria for the CDO's assets. Indeed, the same emails regarding Pyxis were before Justice Schweitzer when he granted Putnam's motion to dismiss nearly identical claims brought against Calyon and Putnam based on the same type of speculative and conclusory allegations regarding the Pyxis CDO. *See Loreley Fin. (Jersey) No. 7 v. Crédit Agricole Corporate & Inv. Bank*, Index No. 10-650673, slip. op. at 2-4 (N.Y. Sup. Ct. June 9, 2011).

More specifically and as further explained below, the only two claims alleged against the Magnetar defendants in the Amended Complaint—the Third Cause of Action for aiding and abetting fraud and the Fourth Cause of Action for civil conspiracy to commit fraud—fail to state a claim upon which relief may be granted for a number of independent reasons.

First, these derivative fraud claims against the Magnetar defendants fail because there is no viable primary claim for fraud against either Calyon or Putnam.

Second, regardless of any underlying fraud claim, both derivative claims against the Magnetar defendants fail under Rules 9(b) and 12(b)(6) because the Amended Complaint improperly lumps together all of the Magnetar defendants and makes no allegations, much less particularized ones, identifying which Magnetar entity supposedly did what, to whom, and when.

Third, even putting aside this core defect, the Amended Complaint fails to allege any of the elements required to state a claim against any Magnetar defendant for aiding and abetting fraud or civil conspiracy to defraud. With respect to the former, the Amended Complaint does not, and cannot, allege facts that demonstrate that any Magnetar defendant had "actual knowledge" of the misrepresentations and omissions that allegedly induced Intesa to enter into the Intesa Swap, or facts that satisfy the element that any Magnetar defendant provided "substantial assistance" to the other defendants in making or carrying out those

misrepresentations and omissions. As for the civil conspiracy claim, which is not even recognized as an independent tort under New York law, the Amended Complaint does not adequately allege that any Magnetar defendant took part in any corrupt agreement to defraud Intesa, committed any overt act in connection with such an agreement, or furthered that supposed agreement by intentionally participating in the alleged misrepresentations and omissions concerning the collateral selection process and valuations.

Fourth, the conspiracy claim fails because it relies on the same alleged acts as the aiding and abetting fraud claim and, therefore, is duplicative as a matter of law.

SUMMARY OF THE AMENDED COMPLAINT

A. Overview of the Allegations

Intesa alleges that Calyon underwrote and arranged Pyxis (Am. Compl. ¶ 39) and that Putnam was the "nominal" collateral manager for Pyxis (*id*. ¶ 54). According to the Amended Complaint, Pyxis's $1.5 billion portfolio of assets included both "cash" and "synthetic" underlying assets. (*Id*. ¶ 54.) The "synthetic" assets, which comprised 77% of the portfolio, were created through CDS between Pyxis and counterparties that referenced other asset-backed securities not actually owned by Pyxis. (*Id*.) As explained in the Amended Complaint, "[i]n these CDS, Pyxis sold protection to counterparties (*i.e.*, agreed to make payments in the event of specified credit events, such as failure by the security to make interest or principal payments) in exchange for premium payments."[3] (*Id*.) Thus, the primary assets of the CDO were agreements between the CDO, as the protection seller (*i.e.*, taking a "long" position), and unidentified

[3] As alleged in the Amended Complaint, a design feature of Pyxis was that investors in Pyxis would not know the identity of the counterparties that were actually purchasing credit protection from Pyxis because Calyon utilized "back to back hedging transactions." (Am. Compl. ¶ 55.) In other words, any investor who ultimately chose to purchase a note issued by Pyxis accepted as a condition of such investment that it would know with 100% certainty that there were short counterparties on the other side of every CDS that Pyxis entered into but would not know the identity of those short counterparties. Notably, Intesa's claims do not arise from its purchase of any note issued by Pyxis; rather, Intesa bases its claims on a derivatives trade with a third party as to the future performance of a series of notes issued by Pyxis and owned by that third party.

protection buyers who were "shorting" the reference securities via the CDS. (*Id.*) In other words, the very nature of Pyxis required that, at least for 77% of the assets in the portfolio, some investor would stand opposite Pyxis with a short position against the referenced securities.

At its core, the Amended Complaint turns on two alleged misrepresentations and omissions, one concerning the collateral selection process for the CDO and the other concerning valuations for that collateral. (Am. Compl. ¶¶ 70-87.) ***First***, Intesa alleges it entered into the CDS in reliance on representations by both Calyon and Putnam that Putnam, as collateral manager, would be ultimately responsible for collateral selection for the CDO. (*Id.* ¶¶ 71-80.) Intesa now says those representations were not true and that all of the Defendants conspired to give control over the collateral selection process to the Magnetar defendants. More specifically, Intesa alleges that the Magnetar defendants agreed to invest tens of millions of dollars long in the CDO so that they could "hijack" the collateral selection process from Calyon and Putnam, design the CDO to fail, lose on those multi-million dollar long investments, and simultaneously take short positions against the CDO that would pay off when the CDO failed. (*Id.* ¶¶ 46-51.) The Amended Complaint does not offer sufficient detail about Magnetar's alleged long and short positions to explain why this would be economically rational for the Magnetar defendants but, according to the Amended Complaint, Calyon was willing to go along with this arrangement in exchange for the Magnetar defendants' agreement to serve as the CDO's "equity investor," thus "making it possible for Calyon to structure and sell investments in the CDOs, and thereby earn its fees." (*Id.* ¶ 44.) And, according to the Amended Complaint, Putnam acquiesced to the Magnetar defendants' control over the collateral selection process for Pyxis because a former Putnam employee worked for the Magnetar defendants and because Putnam was allegedly incented to earn fees on Pyxis and future CDOs with the Magnetar defendants. (*Id.* ¶¶ 50-51.)

Notably, there is no allegation that any misrepresentation or omission concerning the collateral selection process was made by, disseminated by, or even attributable to any Magnetar defendant.

Second, the Amended Complaint alleges that Intesa entered into the CDS in reliance on false "market" or "spread" valuations of the CDO's collateral provided by Calyon. But again, there is no allegation, not even a generalized or conclusory one, that any Magnetar defendant played any role in the preparation or dissemination of those valuations. (*See, e.g., id.* ¶¶ 83-85.)

Based on these allegations, Intesa has asserted four causes of action. First, Intesa brings a cause of action against Calyon and Putnam, but not the Magnetar defendants, for alleged violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b-5. Second, Intesa brings a cause of action against Calyon and Putnam, but not the Magnetar defendants, for alleged common law fraud. Third, Intesa brings a cause of action against Putnam and the Magnetar defendants for alleged aiding and abetting fraud. Fourth, Intesa brings a cause of action against all defendants for alleged civil conspiracy to defraud.

B. The Material Omissions Regarding the Magnetar Defendants

When it comes to the Magnetar defendants, the Amended Complaint is truly most remarkable for what it does ***not*** allege, particularly given that Intesa had the benefit of the Magnetar defendants' motion to dismiss the original complaint and was unable to address any of these blatant defects. Intesa does ***not***, and cannot, allege that any Magnetar defendant had any involvement at all in the derivatives transaction that allegedly gives rise to Intesa's claims—the Intesa Swap. In fact, Intesa alleges no well-pled facts establishing that:

- Any Magnetar defendant was ***ever*** party to, played any direct or indirect role in, stood to profit from, or even knew about or had anything to do with the Intesa Swap.
- Any Magnetar defendant ***ever*** made any statement or omission to Intesa or was ever present when any statement or omission to Intesa was made.
- Any Magnetar defendant ***ever*** discussed Intesa or the Intesa Swap with anyone from Calyon or Putnam.

- Any Magnetar defendant ***ever*** believed, or had any reason to believe, that the performance of its position in the Pyxis CDO was in any way dependent upon the Intesa Swap.

Even as to the Intesa Swap's reference security—the Pyxis CDO's Class A-1 notes—the Amended Complaint does ***not*** contain any allegations, much less particularized ones, that:

- Any Magnetar defendant ***ever*** owed—or by its conduct assumed—any obligation relating to the marketing or sale of notes issued by the Pyxis CDO to any prospective investor (Intesa included).
- Any Magnetar defendant ***ever*** made any statement or omission to Intesa or was ever present when any statement or omission to Intesa was made—or played any role, direct or indirect, in preparing, approving, or disseminating any statement or omission to Intesa by Calyon or Putnam—concerning the CDO, the collateral selection process, the collateral valuations, or any other subject for that matter.
- Any Magnetar defendant ***ever*** selected—or usurped the exercise of Putnam's independent judgment regarding the selection of—any specific collateral ultimately held by the CDO.
- Any Magnetar defendant ***ever*** held a short position in any class of Pyxis notes that was in any way unusual or extraordinary.

C. The Amended Complaint's References to Emails and Other Documents

The Amended Complaint's selective references to a handful of emails related to Pyxis and other CDOs do not remedy any of these core defects in Intesa's original pleading. In fact, not one of the emails mentions Intesa, the existence of the Intesa Swap, Calyon's ownership of the Class A-1 notes, how the CDO would be marketed to investors, how the assets of the CDO should be valued, or anything whatsoever about the alleged misrepresentations and omissions that purportedly give rise to Intesa's claims.

Nor do the emails even support Intesa's basic theory of fraud. While Intesa claims the emails show that "Magnetar . . . was actually in control of Pyxis (Am. Compl. ¶ 91) [and] exercise[d] this secret control over the Pyxis portfolio (*id.* ¶ 93)," the emails themselves belie such an implausible interpretation. At most, they can be read to show the following with respect to the Magnetar defendants: (1) Magnetar, as a party with "first loss exposure" on its equity investment in the CDO, sought some visibility into, but not control over, the collateral selection

process to satisfy itself that the collateral ultimately selected by Putnam was consistent with Magnetar's commitment to purchase the equity tranche of the CDO; (2) Magnetar repeatedly acknowledged that Putnam had final say in selecting the CDO's assets; (3) Magnetar took a hard line on the collateral management fees sought by Putnam for the Pyxis CDO, as such fees ate away at the return on Magnetar's equity investment (as well as the cash flows available to all long investors), and Magnetar made equity investments in numerous CDOs where Putnam was not the collateral manager; and (4) Magnetar hedged its long equity investment through CDS, the same way Intesa hedged its long position in the Intesa Swap.

For instance, Intesa self-servingly excises or ignores critical portions of the August 2006 email chain referenced at paragraphs 93 and 94 of the Amended Complaint, which make plain that Putnam was diligently and carefully carrying out its responsibilities as collateral manager and that the Magnetar defendants in no way usurped Putnam's ultimate decision-making authority when it came to what went into the CDO. In an email dated August 8, 2006, Carl Bell of Putnam wrote that Putnam could not "accelerate the investment process" for the Pyxis CDO ramp-up; that Putnam had selected "4 CDO assets so far"; that Putnam was looking at "mezz ABS CDO exposure . . . with a collateral pool that scores well on our [Putnam's] risk scoring model"; and that Putnam was "doing preliminary work across a range of deals and when this benchmarking is finished we will be able to pursue a couple of synthetic trades." (Serino Decl. Ex. A.)[4] James Prusko of Magnetar responded, "[w]e will buy CDO CDS on names of *your* [Putnam's] *choosing* at mid-market, or bid list +3bp, *whatever you prefer*," (*id.* (emphasis added)), showing that Magnetar offered to buy CDS on CDOs *chosen by Putnam* at prices

[4] When presented with a motion to dismiss pursuant to Rule 12(b)(6), the Court may rely on "documents attached to the complaint as an exhibit or incorporated in it by reference . . . matters of which judicial notice may be taken," and documents that the plaintiff "relied on in bringing suit." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Accordingly, as exhibits to the Declaration of Joseph Serino, Jr., the Magnetar defendants have provided the Court with complete copies of the specific emails discussed herein.

slightly more favorable to the CDO. Later in the chain, Mr. Prusko confirmed that Putnam was "buying CDO's without us knowing about it." (*Id.*) Also, importantly, while Intesa disingenuously cherry-picks a question from Calyon asking Mr. Prusko whether he wanted to make a "behind-the-scenes" arrangement with co-equity investor Deutsche Bank regarding the warehouse agreement (which agreement is a common feature of the ramping of a CDO) (Am. Compl. ¶ 92), Intesa tellingly omits Mr. Prusko's response: "No, not at all."[5] (Serino Decl. Ex. B.) These emails flatly contradict Intesa's core theory of fraud.

Moreover, the Amended Complaint references emails that Intesa claims show the Magnetar defendants pursued short positions (in unknown amounts) relative to Pyxis in addition to their long equity investment and that Calyon and Putnam supposedly were aware of this fact. Even accepting that notion as true for purposes of this motion, the construction of a synthetic CDO requires finding parties that are willing to take the opposite side of a CDS with the CDO, and there is no restriction on such a party's ability to also have a long position relative to the CDO. In fact, Intesa was also long and short the Pyxis CDO through its own CDS investments. Intesa alleges that it was long the CDO as a seller of the $180 million CDS with Calyon on the Class A-1 notes, but conveniently fails to mention that, as evidenced by documents referenced in the Amended Complaint, it was also short the CDO as a protection buyer of a $10 million CDS on a different class of the CDO's notes. (*See* Kuck Decl. Ex. D, 9/7/2006 Email.) Intesa's short position was actually more than twice the size of the alleged Magnetar short position referenced in the email cited in the Amended Complaint. (Serino Decl. Ex. C.) In other words, akin to

[5] Intesa also references a draft side letter among Calyon, Deutsche Bank, and Magnetar regarding a purported right to veto the warehouse assets, but does not, and cannot, allege that such letter was ever entered into, executed, or became effective, or even that any Magnetar defendant ever exercised any veto with respect to any warehouse asset. But even if such an agreement was entered into, it would not support Intesa's point: first, not all assets that end up in the CDO pass through the warehouse; and second, there is a difference between having a veto right over assets in the warehouse and having the right to select assets in the CDO.

what it faults the Magnetar defendants for, Intesa itself was putting millions of dollars at risk on the ***positive*** performance of the Pyxis CDO by selling credit protection on the A-1 notes while simultaneously investing millions of dollars on the ***negative*** performance of the Pyxis CDO by buying credit protection with respect to other notes issued by the CDO.

D. Disclosures and Agreements Regarding Pyxis

The Amended Complaint similarly elides over details in the October 2006 Offering Memorandum, in which the Magnetar defendants are not alleged to have played any part, that directly undercut Intesa's claims. Most fundamentally, the Offering Memorandum included numerous cautions that each party should perform its own due diligence and statements disclosing potential short positions and conflicts of interest, including, for example:

> IN MAKING AN INVESTMENT DECISION, INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE CO-ISSUERS AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED.
>
> * * *
>
> Any of the Initial Purchasers, the Credit Default Swap Counterparty and their respective Affiliates may . . . (iii) hold long or short financial positions with respect to the Reference Obligations or other securities or obligations of any Reference Obligor or the Issuer[.]
>
> * * *
>
> [I]n light of the broad range of investment products at Putnam, it is possible that ***Putnam could sell a security short that was held in other clients' portfolios***, potentially resulting in a decline in value for that security.

(Kuck Decl. Ex. A, 10/2/06 Off. Mem. at iii, 48-49, Appx. A at 28 (emphasis added).)

Critically, the disclosure that Putnam could itself have trading positions, either for its own account or those of its clients, that conflict with the performance of Pyxis's assets refutes and renders implausible the core basis of Intesa's theory of fraud: that Intesa never would have entered into the CDS if it had known that a party in control of the collateral selection process could also be shorting the same securities.

Similarly, while the Amended Complaint misleadingly suggests that Pyxis was loaded with exposure to "other Magnetar CDOs" (Am. Compl. ¶¶ 101-04), the Offering Memorandum makes clear that, pursuant to the "Eligibility Criteria," Pyxis's holdings of all CDO assets could not exceed 15% of the total value of Pyxis's assets and its holdings of synthetic CDOs could not exceed 10% of the total value of Pyxis's assets. (Kuck Decl. Ex. A at pp. 115, 121-22.) Moreover, the Offering Memorandum made clear that Pyxis had to acquire at least 125 assets (*id.* at p. 123), yet the best that Intesa can do is allege that only "four [of those 125+ assets came from] other Magnetar CDOs." (Am. Compl. ¶ 101.) Because Intesa does not allege that Pyxis ever violated these "Eligibility Criteria," Pyxis's investments in, or referencing other, alleged Magnetar CDOs could not have been more than a small fraction of Pyxis's assets.

The Amended Complaint similarly fails to disclose that the contractual agreement underpinning Intesa's claims, the CDS between Intesa and Calyon, bars Intesa's attempt to assert claims against third parties, like the Magnetar defendants, who had nothing at all to do with the CDS. In entering into the CDS, Intesa represented and agreed that the CDS did "not create any rights or impose any obligations in respect of any entity that is not a party to [the Intesa Swap]." (*See* Kuck Decl. Ex. O, 2003 ISDA Credit Derivatives Definitions at § 9.1(b)(ii).)[6]

ARGUMENT

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). Though the Court must accept the factual allegations of a complaint as true, it is "not bound to accept as

[6] The 2003 ISDA Credit Derivatives Definitions is expressly incorporated by reference into the Confirmation letter from Calyon to Intesa (Kuck Decl. Ex. C, Confirmation Letter at p. 1), which is referenced in the Complaint, (Am. Compl. ¶ 67).

true a legal conclusion couched as a factual allegation." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955). The allegations in the complaint must amount to something more "than labels and conclusions, and a formulaic recitation of the elements of a cause of action . . . ." *Twombly*, 550 U.S. at 555 (rejecting the "no set of facts" pleading standard articulated in *Conley v. Gibson*, 355 U.S. 41 (1957)). Intesa's allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (internal citation omitted). In deciding a motion to dismiss brought under Rule 12(b)(6), the Court may rely on "documents attached to the complaint as an exhibit or incorporated in it by reference . . . matters of which judicial notice may be taken," and documents that the plaintiff "relied on in bringing suit." *Chambers*, 282 F.3d at 153.

As a threshold matter, the two claims against the Magnetar defendants—aiding and abetting fraud and civil conspiracy—should be dismissed under Rule 9(b) because the Amended Complaint not only repeatedly fails to distinguish between "Defendants" (*see, e.g.*, Am. Compl. ¶¶ 7, 9), but even more particularly, systematically lumps together all of the Magnetar defendants, failing to specify which defendant allegedly committed which act. *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993) (Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to "defendants"); *In re Crude Oil Commodity Litig.*, No. 06-Civ.-6677 (NRB), 2007 WL 1946553, at *6 (S.D.N.Y. June 28, 2007) ("In situations where multiple defendants are alleged to have committed fraud, the complaint must specifically allege the fraud perpetrated by each defendant, and 'lumping' all defendants together fails to satisfy the particularity requirement."); *Appalachian Enters., Inc. v. ePayment Solutions, Ltd.*, No. 01-CV-11502 (GBD), 2004 WL 2813121, at *6 (S.D.N.Y. Dec. 8, 2004) (dismissing claims against multiple defendants for conspiracy to defraud where complaint

referred "to the culpable acts committed by all seventeen defendants, without any attempt to differentiate which act was taken by which party, or how the parties are interrelated").

In addition to this threshold defect, the Amended Complaint's speculative and conclusory allegations fail to state a claim against the Magnetar defendants, and therefore both causes of action should be dismissed pursuant to Rules 12(b)(6) and 9(b).[7]

I. INTESA HAS NOT STATED A CLAIM AGAINST THE MAGNETAR DEFENDANTS FOR AIDING AND ABETTING COMMON LAW FRAUD.

Intesa's purported claim against the Magnetar defendants for aiding and abetting common law fraud fails to state a claim. As a preliminary matter, because the underlying common-law fraud claim against Calyon and Putnam fails for the reasons advanced by those Defendants, which are adopted herein, the derivative claim for aiding and abetting fraud likewise fails as a matter of law. *E.g., In re AHT Corp.*, 292 B.R. 734, 746 (S.D.N.Y. 2003), *aff'd* 123 Fed. Appx. 17 (2d Cir. 2005) (dismissing claim for aiding and abetting fraud because "there was no fraud").

In addition, to state an aiding and abetting claim, Intesa needed to allege facts with the particularity required by Rule 9(b) to satisfy two more elements: (1) that each of the Magnetar defendants had actual knowledge of the fraud, and (2) that each of the Magnetar defendants provided substantial assistance to advance the fraud. *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292-93 (2d Cir. 2006) (applying Rule 9(b) to claim for aiding and abetting fraud); *Winkler v.*

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[7] The Court need not even reach these points if the Court (a) concludes that the First Cause of Action against Calyon and Putnam for the alleged violation of Section 10(b) of the Exchange Act and Rule 10b-5—which is the only claim in the Amended Complaint over which this Court has original jurisdiction—fails as a matter of law and/or is time-barred, and (b) elects not to exercise supplemental jurisdiction over the remaining claims in the Amended Complaint, all of which arise exclusively under state law. *See Ernst & Co. v. Marine Midland Bank, N.A.*, 920 F. Supp. 58, 62 (S.D.N.Y. 1996) (citing 28 U.S.C. § 1367(c)(3)); *GVA Market Neutral Master Ltd. v. Veras Capital Partners Offshore Fund, Ltd.*, 580 F. Supp. 2d 321, 334 (S.D.N.Y. 2008) (Sweet, J.) (citing *Olle v. Columbia Univ.*, 332 F. Supp. 2d 599, 620 (S.D.N.Y. 2004) (quoting *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998))) ("[I]n general, where the federal claims are dismissed before trial, the state law claims should be dismissed as well.").

Battery Trading, Inc., 89 A.D.3d 1016, 934 N.Y.S.2d 199 (2d Dep't 2011). Intesa has utterly failed to do so.

A. Intesa Has Failed to Plead that Any Magnetar Defendant Had "Actual Knowledge" of the Supposed Fraud.

The aiding and abetting claim against each Magnetar defendant fails because the Amended Complaint does not, and cannot, allege that any Magnetar defendant had "actual knowledge" of the supposed misrepresentations and omissions allegedly made by Calyon and Putnam to Intesa regarding the collateral selection process and collateral valuations. This element of the aiding and abetting claim requires "defendant's actual, not constructive, knowledge of the fraud." *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 425 (S.D.N.Y. 2007). Although "knowledge" may be averred generally under Rule 9(b), that "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). Rather, to plead "actual knowledge," Intesa must allege "facts that give rise to a strong inference of actual knowledge," by identifying "circumstances indicating conscious behavior by the defendant, or a clear opportunity and a motive to aid the fraud. Ordinary economic motive, however, is insufficient to support the latter alternative." *Burns v. Del. Charter Guarantee & Trust Co.*, 805 F. Supp. 2d 12, 30 (S.D.N.Y. 2011) (Sweet, J.). The Second Circuit has defined "motive" in the fraud context as "concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged," while "[o]pportunity would entail the means and likely prospect of achieving concrete benefits by the means alleged." *Shields*, 25 F.3d at 1130. And, "where there is no apparent motive" the "'strength of circumstantial allegations [indicating conscious behavior by the defendant] must be correspondingly greater.'" *Rosner*, 528 F. Supp. 2d at 425 (quoting *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 184 (2d Cir. 1995)).

To start with, the Amended Complaint does not, and cannot, plead any facts demonstrating "a clear opportunity and motive" for any Magnetar defendant to aid in the alleged misrepresentations and omissions by others regarding the collateral selection process for the underlying CDO and the market value of the CDO's assets. With respect to Intesa specifically, there is ***no*** allegation that any Magnetar defendant (i) even had knowledge of the Intesa Swap; (ii) ever discussed the Intesa Swap, or even Intesa generally, with anyone from Calyon or Putnam; (iii) was ever present when Calyon or Putnam allegedly met with, spoke to, negotiated with, or made representations, oral or written, to Intesa concerning the collateral selection process, valuations, or anything else regarding the CDO or the CDS; or (iv) had any input whatsoever into any representations, oral or written, that would be made to Intesa in connection with the CDS, including any alleged representations concerning the collateral selection process or valuations of any of the CDO's assets. Even more broadly, Intesa has not alleged a single fact establishing that any Magnetar defendant had anything at all to do with—or was even aware of—any misrepresentation or omission, whether oral or written, and whether material or immaterial, to anyone. There is ***no*** allegation that any Magnetar defendant had any role, such as preparation, drafting assistance, and/or providing approval, in any communication, oral or written, made to any investor concerning the Pyxis CDO or any securities or derivative transaction in any way related to Pyxis. Thus, Intesa has not adequately alleged a "clear opportunity" with respect to any Magnetar defendant.

Nor has Intesa pled motive against the Magnetar defendants, having failed to allege any facts establishing "concrete benefits" that would inure to the Magnetar defendants from the Intesa Swap. *See Shields*, 25 F.3d at 1130. While Intesa speculates that the Magnetar defendants had an economic motive for certain CDOs to fail (*see generally* Am. Compl. ¶ 46), even if such a

speculative, conclusory, and economically irrational allegation were true—which it is not—that alleged motive is entirely beside the point here.[8] The relevant inquiry is whether the Magnetar defendants had an extraordinary economic interest in the outcome of the Intesa Swap. Yet Intesa has failed to allege any facts that would establish any economic interest, let alone an extraordinary one, on the part of the Magnetar defendants when it came to whether Intesa would enter into the Intesa Swap. Indeed, Intesa has made no allegation that any Magnetar defendant stood to gain anything from the Intesa Swap. The Amended Complaint alleges no facts to the effect that the consummation of the Intesa Swap was in any way necessary for the completion or closing of the CDO. As the Amended Complaint acknowledges, the deal had already closed and the Class A-1 notes issued by Pyxis had already been purchased on the effective date of the Intesa Swap (Am. Compl. ¶¶ 57-58, 67); so the Intesa Swap had nothing to do with the closing, or even the marketing, of the CDO itself. Moreover, the vaguely-pled long-short position attributed to the Magnetar defendants would have been in no way dependent upon, and would necessarily have been economically indifferent to, the performance or existence of the Intesa Swap. As the Amended Complaint acknowledges, Calyon, not Magnetar, was long the Class A-1 notes and bought the credit protection from Intesa on those notes. (*Id.*) Accordingly, Intesa

[8] Intesa's theory that the Magnetar defendants had an interest in the failure of Pyxis is based solely on untested and unsubstantiated stories from newspapers and other media sources, and is rendered implausible by the evidence that Intesa references in its Amended Complaint. The Amended Complaint alleges that the Magnetar defendants took a substantial long position in Pyxis, purchasing the Class X Subordinated Notes (with an alleged face value of $61.875 million) and "at least a portion of the Preference Shares (equity)." (Am. Compl. ¶¶ 57-58.) By contrast, the Amended Complaint contains no particularized allegations as to the Magnetar defendants' alleged short position with respect to Pyxis, and is thus completely devoid of any allegations that would establish that the Magnetar defendants were economically incented to have their alleged multi-million dollar long investments fail. Therefore, no plausible inference of motive to defraud can be drawn from the Amended Complaint. *See Glaser v. The9, Ltd.*, 772 F. Supp. 2d 573, 594 (S.D.N.Y. 2011) ("Accordingly, even if the mere allegation of Insight's stock sales could raise a plausible inference of scienter—which the Court holds it does not—that inference would not be as strong as the rational competing inference and plaintiffs' argument for motive would still fail."); *United States v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 326, 342 (S.D.N.Y. 2009) ("[C]ommon sense counsels against inferring that a substantial international bank, bearing an historic name and presumably wishing to maintain a global reputation for integrity and honorable dealing, would, with no stake in the criminal securities fraud itself, and no financial incentive other than to maintain the patronage of a fee-generating client, enter into a conspiracy with two Cypriot depositors to defraud investors in the United States.").

has not alleged any plausible motive for any Magnetar defendant to fraudulently induce Intesa to enter into the Intesa Swap. *See Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 555.

Because Intesa failed to allege a "clear opportunity and motive" for any Magnetar defendant with respect to the alleged fraud involved in the Intesa Swap, to adequately allege "actual knowledge" Intesa would need to allege facts constituting "conscious behavior" on the part of the Magnetar defendants, the strength of which "must be correspondingly greater.'" *See Rosner*, 528 F. Supp. 2d at 425. But as set forth above, *see supra* at pp. 7-8, Intesa's Amended Complaint, which relies solely on conclusory allegations of "collusion" and "conspiracy," falls well short of that burden. For all of these reasons, Intesa has failed to plead "actual knowledge."

B. Intesa Has Failed to Plead that Any Magnetar Defendant "Substantially Assisted" the Commission of the Alleged Fraud.

The aiding and abetting claim against the Magnetar defendants fails for the independent reason that the Amended Complaint does not, and cannot, allege that any Magnetar defendant provided "substantial assistance" to the alleged fraud's commission. "Generally, 'substantial assistance' exists where: (1) a defendant 'affirmatively assists, helps conceal, or by virtue of failing to act *when required to do so* enables the fraud to proceed," and (2) "the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Rosner*, 528 F. Supp 2d at 426 (quoting *Cromer v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001) (citing *Diduck v. Kasycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992) (emphasis added)). More specifically, however, as this Court correctly held in *Morin*, "[i]n the context of aiding and abetting, where the primary violations consist of either misrepresentations in, or omissions from, a document, the substantial assistance must relate to the preparation or dissemination of the document itself." *Morin v. Trupin*, 711 F. Supp. 97, 113 (S.D.N.Y. 1989).

Intesa's fraud claim is grounded in alleged misrepresentations contained in, or omissions from, a handful of documents allegedly provided to and relied upon by Intesa in entering into the CDS—a July 14, 2006 "launch email," an August 2006 Pitchbook, an October 2006 Offering Memorandum, a July 25, 2006 "target portfolio," and a March 6, 2007 "market" valuation.[9] (Am. Compl. ¶¶ 71-86.) Accordingly, the standard articulated by this Court in *Morin*—where the plaintiff similarly asserted aiding and abetting fraud claims in connection with alleged misrepresentations in private placement memoranda, appraisals, financial forecasts and tax opinions—is directly on point. *See Morin*, 711 F. Supp. at 101, 113. Here, because Intesa's primary violations, like those in *Morin,* consist of alleged misrepresentations and omissions in various securities-related documents (Am. Compl. ¶¶ 71-86), and because the Amended Complaint does not allege that any of the Magnetar defendants played any role whatsoever in the preparation or dissemination of any of those documents, *see supra* at pp. 7-8, the Magnetar defendants did not lend "substantial assistance" to the supposed fraud of Calyon and Putnam. *See Morin*, 711 F. Supp. at 113. Accordingly, the aiding and abetting claim against the Magnetar defendants fails as a matter of law. *See id.* (no "substantial assistance" or "aiding and abetting" liability where complaint did not allege that defendant participated in preparation or dissemination of allegedly false and misleading statements).

Based on the logic of *Morin*, this Court can dismiss Intesa's aiding and abetting claim against the Magnetar defendants without considering whether the Magnetar defendants' alleged long-short investment strategy somehow amounts to affirmative assistance of the supposed primary fraud. But even if the Court were to consider that issue, the result would be no different.

[9] While Intesa alleges generally that certain misrepresentations were made "orally," it fails to allege who made oral statements to whom, when such statements were made, or the specific substance of any alleged oral statements. (*See, e.g.*, Am. Compl. ¶ 80.) These allegations are thus insufficient under Rule 9(b). Nor does Intesa allege that any Magnetar defendant was even aware that any such oral statements were made, let alone that it had any involvement whatsoever with any such statements.

It is well settled that "[f]inancial transactions that are not considered 'atypical' or 'non-routine' do not constitute substantial assistance" for purposes of an aiding and abetting fraud claim. *Rosner*, 528 F. Supp. 2d at 427; *see also Bruce v. Martin*, No. 87-Civ.-7737 (RWS), 1993 WL 148904, at *6 (S.D.N.Y. April 30, 1993) (Sweet, J.). Intesa's own long and short positions on the Pyxis CDO demonstrate that such a strategy is ***not*** "atypical" or "non-routine."

Likewise, Intesa cannot rely on any inaction or omissions by the Magnetar defendants as "substantial participation" unless the Magnetar defendants owed a duty to Intesa. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Turtur*, 892 F.2d 199, 207 (2d Cir. 1989); *Morin v. Trupin*, 823 F. Supp. 201, 207 (S.D.N.Y. 1993) (Sweet, J.). The Amended Complaint contains no allegation that any Magnetar defendant ever had any duty to make any disclosures to Intesa. To the contrary, Intesa and the Magnetar defendants never met or communicated with one another, *see supra* at pp. 7-8, and Intesa agreed that the Intesa Swap did "not create any rights or impose any obligations in respect of any entity that is not a party to [the Intesa Swap]." (*See* Kuck Decl. Ex. O, 2003 ISDA Credit Derivatives Definitions at § 9.1(b)(ii).)

Finally, in addition to the foregoing, Intesa cannot establish that the Magnetar defendants provided "substantial assistance" to the alleged fraud because the Amended Complaint does not, and cannot, allege that any Magnetar defendant "proximately caused the harm on which primary liability is predicated." *See Rosner*, 528 F. Supp 2d at 426. According to the Amended Complaint, Intesa suffered harm when it entered into the Intesa Swap under allegedly false pretenses. (Am. Compl. ¶ 68.) Given that the Magnetar defendants are not alleged to have played any role in Intesa's decision to enter into the Intesa Swap, and are not alleged to have made, disseminated, prepared, or assisted in the misrepresentations and omissions that allegedly induced Intesa to enter into the Intesa Swap, nothing the Magnetar defendants did or failed to do

could have proximately caused the harm allegedly sustained by Intesa. *See In re Agape Litig.*, 773 F. Supp. 2d 298, 322-23 (E.D.N.Y. 2011) ("[A]n alleged aider and abettor will be liable only where the plaintiff's injury is a direct result or reasonably foreseeable result of the defendant's conduct."); *Jordan (Bermuda) Inv. Co., Ltd. v. Hunter Green Invs. LLC*, 566 F. Supp. 2d 295, 300 (S.D.N.Y. 2008) (Sweet, J.) ("[A] plaintiff must demonstrate that the 'acts of the aider and abettor proximately caused the harm to the [plaintiff] on which the primary liability is predicated."); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 371 (S.D.N.Y. 2007); *Morin*, 711 F. Supp. at 113.

II. INTESA HAS NOT STATED A CLAIM AGAINST THE MAGNETAR DEFENDANTS FOR CIVIL CONSPIRACY TO DEFRAUD.

Intesa's purported claim against the Magnetar defendants for common-law civil conspiracy fails to state a claim for at least three independent reasons: (1) New York does not recognize an independent tort of civil conspiracy; (2) the civil conspiracy claim is duplicative of Intesa's aiding and abetting claim; and (3) Intesa has failed to allege the required elements of a claim for conspiracy to defraud.

A. Intesa's Civil Conspiracy Claim Must Be Dismissed Because Intesa Has Not Alleged an Underlying Fraud Claim.

New York does not recognize an independent civil tort of conspiracy. *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006). While civil conspiracy can be used as a theory to "establish the vicarious liability of co-conspirators for each other's offenses," *Marino v. Grupo Mundial Tenedora, S.A.*, 810 F. Supp. 2d 601, 610 (S.D.N.Y. 2011) (Sweet, J.), any "claims of civil conspiracy which do not allege, or which insufficiently allege, an underlying tort must be dismissed for failure to state a claim under Rule 12(b)(6)," *id*. Here, because the underlying common law fraud claim fails for the reasons advanced by Calyon and Putnam, which are adopted herein, the claim against the Magnetar defendants for civil conspiracy to

defraud must be dismissed. *Id.*; *Crigger v. Fahnstock & Co.*, Inc., 443 F.3d 230, 237 (2d Cir. 2006) (citing *Vasile v. Dean Witter Reynolds Inc.*, 20 F. Supp. 2d 465, 482 (E.D.N.Y. 1998) *aff'd*, 205 F.3d 1327 (2d Cir. 2000) ("[C]ivil conspiracy to defraud, standing alone, is not actionable . . . if the underlying independent tort has not been adequately pleaded.")).

B. Intesa's Civil Conspiracy Claim Must Be Dismissed Because It Is Duplicative of Its Aiding and Abetting Claim.

The civil conspiracy claim against the Magnetar defendants also fails as a matter of law because it is duplicative of the aiding and abetting claim asserted against the Magnetar defendants. Indeed, "where the acts underlying a claim of conspiracy are the same as those underlying other claims alleged in the complaint, the conspiracy claim is dismissed as duplicative." *Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.*, No. 99 Civ. 9623 (RWS), 2007 WL 1040809, at *26 (S.D.N.Y. April 4, 2007) (Sweet, J.), *aff'd sub nom. Briarpatch Ltd. LP v. Phoenix Pictures, Inc.*, 312 Fed. Appx. 433, 434 (2d Cir. 2009), *cert. denied* 130 S. Ct. 257 (2009); *see also Kew Gardens Hills Apt. Owners, Inc. v. Horing Welikson & Rosen, P.C.*, 35 A.D.3d 383, 828 N.Y.S.2d 98, 101 (2006). Because Intesa's purported factual allegations concerning its claim for conspiracy to defraud are the same as those concerning its claim for aiding and abetting fraud (*compare* Am. Compl. ¶¶ 158-166 *and* Am. Compl. ¶¶ 167-173), the conspiracy claim against the Magnetar defendants must be dismissed as duplicative. *See Briarpatch*, 2007 WL 1040809, at *26.

C. Intesa Has Failed to Plead the Elements of Conspiracy to Defraud.

The conspiracy claim also fails because the Amended Complaint does not adequately plead the elements of a civil conspiracy or otherwise state a claim upon which relief can be granted. To state a claim for civil conspiracy to commit fraud, in addition to the underlying fraud, a plaintiff is required to plead four elements with particularity under Rule 9(b): "(1) a corrupt agreement between two or more parties; (2) an overt act in furtherance of the agreement;

(3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 446 (S.D.N.Y. 2000) (Sweet, J.); *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972); *Fezzani v. Bear, Stearns & Co., Inc.*, 592 F. Supp. 2d 410, 428 (S.D.N.Y. 2008); *de Atucha v. Hunt*, 128 F.R.D. 187, 189 (S.D.N.Y. 1989), *aff'd sub nom. de Atucha v. Commodity Exch.*, 979 F.2d 846 (2d Cir. 1992). As explained below, Intesa has failed to adequately plead any of the necessary elements with the required specificity.

In the context of a claim for conspiracy to commit fraud, the "corrupt agreement" must be an agreement to defraud the particular plaintiff. *See de Atucha*, 128 F.R.D. at 190-91. To properly plead that any Magnetar defendant entered into a "corrupt agreement" to defraud Intesa, the Amended Complaint was required to allege "who agreed with whom to do what," and these allegations cannot be conclusory. *de Atucha*, 128 F.R.D. at 190; *see also Int'l Fund Mgmt. S.A. v. Citigroup Inc.*, 822 F. Supp. 2d 368, 387 (S.D.N.Y. 2011) (dismissing conspiracy to defraud claim where plaintiff alleged agreement based on joint attendance at company meetings where "CDO exposure was discussed"); *Fezzani*, 592 F. Supp. 2d at 432. Other than pure speculation and conclusory allegations, neither of which is sufficient under Rule 9(b) or even Rule 8(a), the Amended Complaint does not, and cannot, allege that the Magnetar defendants ever even discussed Intesa or its CDS trade with Calyon or Putnam, let alone entered into a corrupt agreement with them to defraud Intesa into entering into a CDS with Calyon to sell credit protection for notes that the Magnetar defendants did not own.

Intesa's transparent strategy of referencing emails in the Amended Complaint to create the false appearance of some impropriety cannot remedy this fundamental pleading defect. The emails make not a single mention of Intesa, a CDS between Calyon and anyone else, or anything

in any way related to the marketing of the CDO or any securities transaction.[10] Thus, Intesa's speculative allegations based on routine business communications fall far short of the particularity required under Rule 9(b). *See Int'l Fund Mgmt.*, 822 F. Supp. 2d at 387.

The Amended Complaint also fails to allege that any Magnetar defendant committed an overt act in furtherance of the allegedly corrupt agreement. To satisfy this element, the complaint must "connect the alleged fraudulent activities" of the principal defendants with the alleged co-conspirators. *de Atucha*, 128 F.R.D. at 190. Intesa's Amended Complaint fails to connect any act by the Magnetar defendants to any allegedly fraudulent statement or omission by Calyon or Putnam: Intesa does not allege that any Magnetar defendant made, participated in, prepared, approved, disseminated, or agreed that any party would make ***any*** statement to anyone relating in any way to the Pyxis CDO, much less the alleged fraudulent statements regarding the collateral selection process or valuations that purportedly induced Intesa to enter into the CDS with Calyon. Intesa has therefore failed to allege any overt act by the Magnetar defendants in furtherance of a corrupt agreement to defraud Intesa. *See id.*

Finally, Intesa's Amended Complaint does not and cannot allege that the Magnetar defendants intentionally participated in furtherance of the alleged fraud. To satisfy this requirement, Intesa needed to allege specific facts "supporting a strong inference that the . . . Defendants acted with actual intent to participate in the alleged conspiracy and to injure the

[10] Although not directly relevant to this issue, the emails selectively characterized in the Amended Complaint do not support Intesa's contentions that Putnam abdicated its responsibility to exercise final judgment over the assets selected for Pyxis and that the Magnetar defendants sought to put lower quality assets in Pyxis' collateral pool. The inference that Intesa draws from these emails—that the Magnetar defendants controlled the collateral-selection process for Pyxis in order to cause its failure—is grounded purely in speculation and innuendo, and is far less plausible than the contrary explanation that the Magnetar defendants sought some awareness of Putnam's collateral selection process because Magnetar's alleged $61.75+ million "long" investment in the CDO was riding on the strength and quality of that collateral. *Hyman v. Cornell Univ.*, 834 F. Supp. 2d 77, 82 (N.D.N.Y. 2011), *aff'd* 2012 WL 2096733 (2d Cir. 2012) (summary order) (dismissing complaint based on "an implausible reading" of emails quoted in the complaint). This is particularly so given that Intesa fails to identify a single asset in Pyxis' portfolio that did not meet the detailed criteria in the October 2, 2006 Offering Memorandum, or a single communication by any Magnetar defendant to any other party suggesting unsuitable assets for Pyxis's portfolio.

plaintiff." *In re Food Mgmt. Group, LLC*, 380 B.R. 677, 704 (Bankr. S.D.N.Y. 2008). Intesa does not allege any actions by the Magnetar defendants that create a strong inference of an "intent to injure" Intesa. *See de Atucha*, 128 F.R.D. at 191; *cf. Callahan v. Gutowski*, 111 A.D.2d 464, 465 (2d Dep't 1985) ("A lawful act done in a lawful way, no matter how damaging the result, cannot be the basis for a claim of fraudulent conspiracy, even if it was performed maliciously."). The Amended Complaint does not allege that any Magnetar defendant knew of Intesa, that any Magnetar defendant owed or assumed any duty to Intesa, or that any Magnetar defendant knew that Intesa had entered into (or planned to enter into) the Intesa Swap. Moreover, as noted above, the notion that the Magnetar defendants intended to injure Intesa by causing it to enter into the Intesa Swap makes no sense because that CDS would have had absolutely no economic impact on the supposed long-short strategy of the Magnetar defendants. *See de Atucha*, 128 F.R.D. at 191.

CONCLUSION

For the foregoing reasons, Magnetar Capital LLC, Magnetar Financial LLC, and Magnetar Capital Fund, LP respectfully request that the Court dismiss the Amended Complaint against them in its entirety and with prejudice, including the Third and Fourth Causes of Action therein.

Dated: New York, New York
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/s/ Joseph Serino, Jr.

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